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June 23, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND DELIVERY

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals -- Room TW-A325
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation: *In the Matter of Implementation of Section 255 of the Telecommunications Act of 1996: Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities (WT Docket No. 96-198)*

Dear Ms. Salas:

On Tuesday, June 22, 1999, Michael Petricone of the Consumer Electronics Manufacturers Association and David Alan Nall and Benigno E. Bartolome of Squire, Sanders & Dempsey LLP, met with Tom Power, Senior Legal Advisor to Chairman William E. Kennard. Messrs. Petricone and Nall also had a separate meeting with Ellen Blackler of the Common Carrier Bureau and Elizabeth Lyle of the Wireless Telecommunications Bureau.

At the meetings, the parties discussed the information presented in the attached document titled "Consumer Electronics Manufacturers Urge That the Rules Implementing Section 255 Provide an Economically Realistic Basis for Compliance With the Statute." Copies of this document were distributed at the meetings. A copy of this document was also presented to Linda Kinney of the Office of Commissioner Ness. The parties also discussed arguments raised by CEMA in its comments filed in the above-referenced docket.

Pursuant to Section 1.1206 of the Commission's Rules, an original and a copy of this letter, both of which include the written material presented at the meeting, are being filed with

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your office for inclusion in the public record. If you have any questions concerning this submission, please contact the undersigned.

Sincerely,



David Alan Nall

*Counsel for the Consumer Electronics
Manufacturers Association*

Enclosure

Copy: Thomas Power, Office of Chairman Kennard
Ellen Blackler, Common Carrier Bureau
Elizabeth Lyle, Wireless Telecommunications Bureau
Linda Kinney, Office of Commissioner Ness
Michael Petricone, Director of Technology Policy, CEMA



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**CONSUMER ELECTRONICS MANUFACTURERS URGE THAT THE
RULES IMPLEMENTING SECTION 255 PROVIDE AN ECONOMICALLY
REALISTIC BASIS FOR COMPLIANCE WITH THE STATUTE**

- ◆ The implementation of Section 255 need not cause serious disruption in the consumer electronics marketplace, if the Commission is guided by three important considerations in adopting rules to implement the intent of Congress:
 - The definition of "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense" must be interpreted as allowing manufacturers in the highly competitive market for customer-premise equipment (CPE) to exercise their economic judgment, in the first instance, as to the inclusion of accessibility features in the design, development, and fabrication of products, as long as sufficient consideration is given to such features. The Commission should not second-guess such judgments in the absence of preponderant evidence that easily accomplishable and relatively inexpensive methods for achieving accessibility were not implemented or considered.
 - CPE manufacturers must not face substantial uncertainties in introducing new products. The Commission's rules should provide a "safe harbor" for compliance with Section 255 by instructing manufacturers to comply with non-burdensome process and documentation requirements.
 - Enforcement of Section 255 should be premised on the fact that no injury results unless a particular product lacks accessibility features and there are no readily available substitute products providing such features.
- ◆ The Commission must recognize that not every product can be made accessible for every type of disability. A "product-line" approach, which takes into account whether the actual needs of persons with disabilities are addressed by means of a manufacturer's whole product line, is consistent with the language and purpose of Section 255.
- ◆ The procedural rules for Section 255 enforcement promote fairness and expeditious resolution of complaints. They should include:
 - Mandatory prior conciliation efforts, initiated through consumer contact with an announced, easily available manufacturer's contact person;
 - Standing requirements, based on injury-in-fact;
 - Reasonable limits (two years) on stale complaints;
 - Adequate periods (30 days) for responses to complaints; and
 - Mechanisms to protect manufacturers' proprietary information.
- ◆ Enforcement remedies should not include rewards of damages assessed against manufacturers, but rather prospective and injunctive relief.
- ◆ The Commission should not attempt to expand its jurisdiction beyond the bounds of Section 255, despite a staff proposal to cover voice mail and other information services. The FCC's jurisdiction under Section 255 is limited to telecommunications services, telecommunications equipment, and customer premises equipment as defined

by Section 3 of the Communications Act. The Act clearly distinguishes between telecommunications services and equipment, CPE, and information services. Federal case law, key FCC rulings, and the record in this proceeding do not support the FCC's exercise of ancillary jurisdiction over information services (and the software and equipment used with such services) for the purposes of implementing Section 255.

- The plain meaning of the statutory language in Section 255 does not confer Commission authority over information services. *See 47 U.S.C §255 (1996).*
- While the staff proposal may contend that the proposed action is reasonably ancillary to the FCC's effective performance of its implementation of Section 255, ancillary jurisdiction must be necessary to ensure the achievement of the FCC's statutory obligations. *U.S. v. Southwestern Cable Co., 392 U.S. 157 (1968)(emphasis added).*
- Ancillary jurisdiction must be "directed at protecting or promoting a statutory purpose." *Computer II Final Decision, 77 FCC 2d 384 (1980).*
- [T]he allowance of 'wide latitude' in the exercise of delegated powers is not the equivalent of untrammelled freedom to regulate activities over which the statute fails to confer, or explicitly denies, Commission authority...For the discretion argument to be decisive, it must be demonstrated that the action challenged in this case is justified because of the established breadth of particular Commission powers. *NARUC v. FCC, 525 F.2d 630 (D.C. Cir.) 1976 (emphasis added).*
- Although [Courts] respect the Commission's exercise of discretion in an area in which it has expertise, [it] cannot...accept an agency's change of course uncritically....Section 10(e) of the APA requires [Courts] to determine whether the Commission's decision was a reasonable exercise of its discretion based on consideration of relevant factors, and supported by the record....Under the APA, an agency's discretion is not boundless, and [Courts] must satisfy that the agency examined the relevant data and articulated a satisfactory explanation for its action based upon the record. *People of the State of California v. FCC, 905 F.2d 1217 (1990).*
- ♦ The staff proposal, if adopted, would place manufacturers of telecommunications equipment and CPE, software developers, information service providers and providers of telecommunications services in a precarious position whereby they are compelled to oppose the FCC's proposed action in order to preserve the regulated versus unregulated dichotomy between basic telecommunications services and information services in other proceedings, *i.e.*, the Universal Service and CALEA rulemaking proceedings.
- ♦ There is a very real likelihood that many industry sectors would seek administrative and judicial review of an FCC decision that directly or indirectly expands the Commission's exercise of authority over information services, even for the limited purposes of implementing Section 255. Litigation invariably spawns uncertainty and redirects resources and efforts away from the critical issues that the consumer electronics industry is addressing, *i.e.*, research and development, employee training, strategic planning on accessibility issues, consumer education.